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IN THE

Supreme Court of the United States

October Term A. D. 1952

No. 234

GULF REFINING COMPANY,

Petitioner,

versus

MABEL ATCHISON, wife of, and BOSCO FRANICEVICH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Gulf Refining Company, respectfully petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment and opinion rendered in this cause on May 2, 1952, application for rehearing having been denied on June 20, 1952, without a written opinion.

I. *SUMMARY STATEMENT OF THE MATTER INVOLVED*

This action was filed June 14, 1948 in the United States District Court for the Eastern District of Louisi-

ana, New Orleans Division, by Respondents herein against Petitioner herein and American Employers Insurance Company, surety on the bond posted by the sheriff of Plaquemines Parish, Louisiana, for damages alleged to have resulted from an assault against Respondents in which an employee of Petitioner, and two deputy sheriffs of Plaquemines Parish, Louisiana, participated. Federal jurisdiction was based solely on diversity of citizenship. On motion of American Employers Insurance Company the action was dismissed as to it on the ground that the sheriff, who was the principal on the bond, was an indispensable party and that his joinder would destroy diversity. (*Atchison, et al. v. Gulf Refining Company, et al.*, 174 Fed. 2d 476.)

The events out of which the action arose occurred on July 29, 1947, at Ostrica, Louisiana, an isolated community located on the east bank of the Mississippi River in Plaquemines Parish, some seventy miles south of New Orleans.

Petitioner was, on July 29, 1947, and had been for many years prior thereto, engaged in drilling and operating oil wells east of Ostrica in the waters of Quarantine Bay. In order to get specially equipped trucks to such operations it was necessary to transport them by barge across the Mississippi River at Ostrica. The trucks were then driven across the levee, a distance of approximately 300 yards over a right-of-way, owned by Petitioner, where they were loaded on another barge which took them to the oil-well locations in Quarantine Bay. Petitioner had obtained a right-of-way from the governing authority of Plaquemines Parish and had used said right-of-way regularly for the passage of its employees and vehicles since 1940. (196 Fed. 2d 258, 259, fn. 1; R. 366)

Respondent, Bosco Franicevich, obtained a sublease on property which included the right-of-way under lease to Petitioner and built adjacent to said right-of-way a combination residence, saloon and grocery in "1942 or 1943." (Testimony of Bosco Franicevich, R. 37)

After occupying this building for several years, Bosco Franicevich objected to Petitioner's use of its right-of-way. At approximately 8:00 P.M. on July 29, 1947, he stopped one of Petitioner's trucks on the right-of-way near the front of his building and informed the driver that the truck could not proceed. (Article 5 of Complaint—R. 4) The driver of the truck notified Jack Grammer, employee of Petitioner, who, acting on instructions of his supervisor, telephoned the sheriff's office of Plaquemines Parish and approximately 45 minutes thereafter Charles Connetti, Chief Deputy, and Louis Mistich, Assistant Deputy, arrived. They were met by Jack Grammer and the three men then approached Bosco Franicevich's saloon which was the part of the building nearest to and fronting on the river. One of the deputies informed Franicevich, who was in his saloon, that the truck was going to pass and the truck was then driven over the right-of-way.

Thereafter an argument ensued between Bosco Franicevich on the one hand and Charles Connetti, Louis Mistich and Jack Grammer on the other hand. The two deputies were armed and at some stage during the argument one of the deputies handed a pistol to Jack Grammer. After the argument began, Respondent, Mrs. Franicevich, came into the saloon. (Article 11 of Complaint—R. 6; Testimony of Mrs. Franicevich—R. 138) Respondents testified that during the argument Charles Connetti, Louis Mistich and Jack Grammer made threats

against Bosco Franicevich. There was no evidence whatever offered that Jack Grammer, Petitioner's employee, at any time, threatened, or committed any overt acts against, Mrs. Franicevich. The only possible tortious acts attributable to Jack Grammer on which any proof whatever was offered were the words, "Best thing to get him out, then shoot him" and "Get him; shoot him—get him," (196 Fed. 2d 258, 259; R. 367) all of which referred to Bosco Franicevich. At the conclusion of the argument the deputy sheriffs and Jack Grammer, at the invitation of Respondent, Bosco Franicevich, entered the saloon and after a few minutes' discussion departed.

Respondent, Mrs. Franicevich, testified that after her arrival at the scene of the argument she became greatly agitated and disturbed *for her husband's safety because of the threats made against him* by the deputy sheriffs and Jack Grammer. (R. 116) She further testified that she felt ill shortly after the altercation and that she did not sleep much during the night of July 29-30, 1947; that she arose on the morning of July 30, 1947, and performed her household duties and attended to the post office at Ostrica, of which she was postmistress; that at about noon on that day she began to bleed; that about midnight on July 30-31, 1947, she began to bleed profusely and that during the next morning between 3:00 and 4:00 o'clock she had a miscarriage. (R. 119-122)

Dr. Vincent D'Ingianni attended Mrs. Franicevich at her home at about 7:00 o'clock on the morning of July 31, 1947, at which time she was bleeding from the vagina and a short time later she went to Dr. D'Ingianni's office where he removed the products of an afterbirth and inserted a packing in her womb; Mrs. Franice-

vich visited Dr. D'Ingianni's office again the following day. (Testimony of Dr. D'Ingianni, R. 211, 225, 228) She visited Dr. J. T. Reeves on August 15, 1947, August 29, 1947 and September 6, 1947, during which visits he treated her for bleeding, and on the last visit recommended that she have an operation. (Testimony of Dr. Reeves, R. 73-74) Dr. Reeves testified that examination of Mrs. Franicevich revealed that her "womb was flabby, it didn't contract and tighten down to where the blood vessels would close off." (R. 75) The record does not disclose any further medical attention until November 5, 1947, on which date Mrs. Franicevich was admitted to the Baptist Hospital in New Orleans where, based on a pathological report, her malady was diagnosed as *uterine fibrosis, uterine myoma hyperplasia* and *appendicitis.* (Testimony of Dr. Beacham, R. 283) She was operated on by Dr. W. D. Beacham on November 8, 1947, at which time he "*did an abdominal total hysterectomy and an appendectomy*" (Testimony of Dr. Beacham, R. 281); the first mentioned is the removal of the uterus, a necessary result of which is sterility. Dr. Reeves, Dr. Beacham and Dr. Dyer testified without contradiction that the operation performed on Mrs. Franicevich, and resulting in her sterility, was necessitated by *uterine fibrosis, uterine myoma hyperplasia,* and that this condition existed prior to the alleged assault. (Dr. Reeves, R. 90—Dr. Beacham, R. 284—Dr. Dyer, R. 311) Dr. Dyer further testified without contradiction that *uterine fibrosis* is one of the processes of growing old and is not caused by a miscarriage or an abortion. (R. 311)

Respondents alleged in their complaint that the miscarriage of "Mrs. Franicevich, together with the resultant operation and her present sterile condition were caused solely by the shock she suffered as a result of

the violently aggressive acts of Charles Connetti, Louis Mistich and Jack Grammer" and "that the said acts of Charles Connetti, Louis Mistich and Jack Grammer were unwarranted and constituted a malfeasance and misfeasance performed by them in the course of their respective duties as Deputy Sheriffs of Plaquemines Parish and Transportation Superintendent of Gulf Refining Company" (Articles 19 and 20 of Complaint, R. 8) and asked for judgment against Petitioner and American Employers Insurance Company jointly and severally for $100,000, the alleged damages being enumerated as follows:

Medical Expenses	$ 570.99
Pain and suffering of Mrs. Franicevich	25,000.00
Loss of ability to have children	49,429.01
Mental anguish and suffering of Mr. Franicevich	25,000.00
Total Claim	$100,000.00

As stated above, the action was dismissed against American Employers Insurance Company. Petitioner filed its answer denying liability on the grounds (1) that Respondents did not suffer the damages alleged, (2) that there was no assault and (3) that Jack Grammer was not acting within the scope of his employment at the time he participated in the alleged assault.

The trial was before a jury and at the close of all the evidence and before the withdrawal of the jury and before the Trial Court charged the jury, Petitioner filed the following motions:

1. Motion For A Directed Verdict. (R. 344-345)

2. Motion To Withdraw A Particular Issue From The Jury's Consideration, Namely, Plaintiffs' Demand For Damages In The Sum of $25,000 For "MENTAL ANGUISH AND SUFFERING OF MR. FRANICEVICH." (R. 346)

3. Motion To Withdraw A Particular Issue From The Jury's Consideration, Namely, Plaintiffs' Demand For Damages In The Sum Of $25,000 For "PAIN AND SUFFERING OF MRS. FRANICEVICH." (R. 346-347)

4. Motion To Withdraw A Particular Issue From The Jury's Consideration, Namely, Plaintiffs' Demand For Damages In The Sum Of $49,429.01 For "LOSS OF ABILITY TO HAVE CHILDREN." (R. 347-348)

The Trial Court declined to rule on any of the motions, giving as its reason:

> "That it is the practice not to rule on those motions until after the Jury has come in, so that if we want to set aside the Jury's verdict we will, and further, if after setting the Jury's verdict aside the Court of Appeals feels that we should not have set it aside they can let it stand without sending it back again to be retried. For that reason, we keep these motions under the submission until the Jury comes in. Then we grant them or deny them as the case may be." (R. 332)

The jury returned a general verdict in favor of Respondents for $8500.00, and judgment was entered on November 2, 1950 (R. 348) On November 8, 1950, the Trial Court overruled all of Petitioner's motions enumerated above. (R. 349) On November 13, 1950, Petition filed (1) A Motion To Set Aside The Verdict And Order And For Judgment For Defendant Notwithstanding The Verdict And Order (R. 350-351), and (2) An Alternative Motion For A New Trial. (R. 352-353) Both

of these motions were overruled by the Trial Court on November 15, 1950. (R. 354-355)

Petitioner perfected its appeal to the Circuit Court of Appeals for the Fifth Circuit (R. 355-362) assigning as errors all of the above adverse rulings. (R. 355) The Circuit Court of Appeals affirmed the judgment of the Trial Court. (196 Fed. 2d 258)

II. *JURISDICTIONAL STATEMENT*

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was entered on May 2, 1952 (R. 374) and the opinion of that Court is reported in 196 Fed. 2d 258. The application for rehearing was denied on June 20, 1952. (R. 397)

On June 26, 1952, the Circuit Court of Appeals entered an order staying its mandate for 45 days from that date in order for Petitioner to make application for a writ of certiorari, conditioned upon Petitioner giving an additional bond in the sum of $2,000.00. (R. 402) In compliance with the aforesaid order, Petitioner gave the additional bond which was approved by the Circuit Court of Appeals on July 7, 1952. (R. 403)

This Court has jurisdiction under Title 28, Section 1254 (1), U. S. Code and U. S. Supreme Court Rule 38 (5b).

III. *QUESTIONS PRESENTED*

1. The first question is whether it is prejudicial error for the Trial Court to submit to the jury for a general verdict all of several issues of fact where one of said issues is not supported by any evidence and defendant has by timely motion requested that such issue

be withdrawn from the jury's consideration. This question, in turn, involves the following corollary question:

2. Whether Rule 50 (b) of the Federal Rules of Civil Procedure (28 U.S.C.A.), which permits a Trial Court to withhold passing on a motion for a directed verdict until after the jury has returned its verdict applies to both (a) a motion for a directed verdict on the whole case and (b) a motion for a directed verdict on a particular issue, where the whole case is submitted for a general verdict.

3. The third question is whether it is error for the Circuit Court of Appeals to sustain a general verdict by inferring a finding by the jury which is contrary to established local law.

IV. *REASONS FOR GRANTING THE WRIT*

Petitioner assigns as reasons for the issuance of a writ of certiorari the following:

1. The decision rendered herein by the Circuit Court of Appeals for the Fifth Circuit is contrary to the decisions of the Circuit Court of Appeals for the Second Circuit, in the case of *Rashaw v. Central Vermont Ry.*, Inc., 133 Fed. 2d 253 (1943) and the Circuit Court of Appeals for the Fourth Circuit in the case of *Baltimore & O. R. Co. v. Deneen*, 161 Fed. 2d 674 (1947) and the Circuit Court of Appeals for the Eighth Circuit in the case of *Roth v. Swanson*, 145 Fed. 2d 262 (1944), in which cases it was held to be reversible error to submit to the jury for a general verdict all of several issues of fact where one of said issues is not supported by any evidence and the submission of such issue is timely objected to by defendant.

2. There is here presented for decision a question of importance as to the proper application of Rule 50 (b) of the Federal Rules of Civil Procedure which has not been, but should be, settled by this Court.

3. The decision rendered herein by the Circuit Court of Appeals is in conflict with applicable local law in holding Petitioner liable for the tortious acts of a third person other than its employee, contrary to Louisiana Revised Civil Code, Articles 2317 through 2322, *Adams v. Golson*, 174 So. 876, 186 La. 363, and *Gott v. Scott*, 199 So. 460, La. App.

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and the proceedings of the Circuit Court of Appeals had in the case numbered and entitled on its docket *No. 13,558, Gulf Refining Company, Appellant, v. Mabel Atchison, wife of, and Bosco Franicevich, Appellees*, to the end that that cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said Court of Appeals be reversed by this Court, and for such further relief as this Court may deem proper.

GULF REFINING COMPANY,
Petitioner.

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July , 1952.

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GULF REFINING COMPANY,

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MABEL ATCHISON, wife of, and
BOSCO FRANICEVICH,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

OPINION OF THE COURT

The opinion of the Court below is officially reported in 196 Fed. 2d 258.

STATEMENT OF THE CASE

A statement of the case is found on pages 1 to 8 of the foregoing petition, and is adopted herein and made a part of this brief.

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals for the Fifth Circuit erred:

I.

In affirming the Trial Court's action in submitting the issue, LOSS OF ABILITY TO HAVE CHILDREN, together with other issues to the jury for a general verdict over Petitioner's timely objection that there was no evidence that the sterility of Mrs. Franicevich was the proximate result of the alleged assault.

II.

In affirming the judgment and orders of the Trial Court which declined to rule on Petitioner's motion to withdraw from the jury one of several issues of fact, namely, LOSS OF ABILITY TO HAVE CHILDREN, prior to the submission of the whole case to the jury for a general verdict, thus applying to said motion the rule applicable to a motion for a directed verdict on the whole case.

III.

In affirming the Trial Court's judgment allowing Respondents to recover for alleged injuries to Mrs. Franicevich, namely, LOSS OF ABILITY TO HAVE CHILDREN and PAIN AND SUFFERING OF MRS. FRANICEVICH, when there was no evidence showing that Petitioner's employee in any way, assaulted her, by holding Petitioner liable for the tortious acts of a third person other than its employee, contrary to Louisiana law.

ARGUMENT

I.

The Circuit Court of Appeals for the Fifth Circuit in this case has reached a position contrary to the positions taken by the Circuit Court of Appeals for the

Second Circuit in the case of *Rashaw v. Central Vermont Ry., Inc.*, 133 Fed. 2d 253 (1943) and the Circuit Court of Appeals for the Fourth Circuit in the case of *Baltimore & O. R. Co. v. Deneen*, 161 Fed. 2d 674 (1947) and the Circuit Court of Appeals for the Eighth Circuit in the case of *Roth v. Swanson*, 145 Fed. 2d 262 (1944).

In the above cited cases, all of which have been decided since the adoption of the Federal Rules of Civil Procedure, it was held that where a cause of action involves several issues of fact and one of such issues is not supported by substantial evidence, that issue should not be submitted to the jury together with the other issues involved, for a general verdict, over the defendant's objection, and that such a submission constituted reversible error.

In all three cases the reason given for such a holding is that when a jury returns a general verdict it is impossible to ascertain on which issue the jury based its verdict. This rationale is succinctly stated in the case of *Roth v. Swanson, supra*, in which the Court said (page 269):

> "Where several issues of fact are tried, and any one of them is erroneously submitted to the jury over the objection of a defendant, and a general verdict is returned against him, he is entitled to have the verdict set aside and to have a new trial. This is because it is impossible to say whether the verdict was based upon an issue which was properly submitted to the jury or upon an issue which was improperly submitted." (Citing cases.)

Petitioner's specification that the Trial Court erred in not withdrawing from the jury's consideration the

issue, LOSS OF ABILITY TO HAVE CHILDREN, on the ground that the evidence failed to show that the sterility of Mrs. Franicevich was the proximate result of the alleged assault, was disposed of without discussion as to whether or not there was any evidence to support this issue of fact by the Circuit Court of Appeals which stated:

> "In any event, the very circumstances and nature of the assault, which the jury undoubtedly must have found to have existed in this case, would authorize the recovery of damages. It is concluded that the verdict and judgment are supported by the evidence and consistent with the applicable law." (196 Fed. 2d 258, 261; R. 372-373)

Petitioner, in its application for rehearing, emphasized that the Circuit Court of Appeals had failed to pass on the merits of Petitioner's contention that Respondents had failed to sustain the burden of proving that Mrs. Franicevich's sterility was the proximate result of the alleged assault. Petitioner respectfully points out to this Court that the Circuit Court of Appeals, by their language quoted above, could not have been intending to permit the recovery of punitive damages by Respondents since punitive damages are not allowed under Louisiana law, as the Trial Court properly instructed the jury. (R. 338)

There being no evidence that the sterility of Mrs. Franicevich (LOSS OF ABILITY TO HAVE CHILDREN) was the proximate result of the alleged assault, (summary statement, pages 4 and 5) it therefore follows that the reasoning of the cases cited above is applicable to this case and that the Circuit Court of Appeals for the Fifth Circuit in taking a contrary position

has created a conflict among the Circuits on this question. Petitioner, therefore, submits that this Court should grant the writ of certiorari for the purpose of securing uniformity of decision among the Circuits.

II.

Petitioner earnestly submits that the second question presented is one of great public importance as the action of the Trial Court in withholding passing on Petitioner's motions to withdraw particular issues from the jury prior to submission of the whole case to the jury for a general verdict calls for a clarification of Rule 50 (b) of the Federal Rules of Civil Procedure.

The request to withdraw from the jury the issue, LOSS OF ABILITY TO HAVE CHILDREN, on the ground that there was no evidence to show that Mrs. Franicevich's sterility was the proximate result of the assault, and the request to withdraw from the jury the issue, PAIN AND SUFFERING OF MRS. FRANICEVICH, on the ground that there was no evidence to show that the injury was the proximate result of the assault against Mrs. Franicevich were in essence motions for directed verdicts as to these particular issues. The Trial Court, in declining to pass on these motions, which appear on pages 6 and 7 of the summary statement, said:

> "I might state further that it is the practice not to rule on those motions until after the Jury has come in, so that if we want to set aside the Jury's verdict we will, and further, if after setting the Jury's verdict aside the Court of Appeals feels that we should not have set it aside they can let it stand without sending it back again to be retried. For that reason we keep these motions under the submission until the Jury comes in. Then we grant them or deny them as the case may be." (R. 332)

Under Rule 50 (b) a ruling on a motion for a directed verdict may be withheld until after the jury has returned its verdict. The question here presented is whether Rule 50 (b) permits a Trial Court to withhold its ruling when a motion for a directed verdict is directed to only one of several issues. This question has never been passed upon by the Supreme Court, or, as far as Petitioner has been able to determine, by any other Appellate Court. It is submitted that a decision on this question is necessary in order to clarify the proper application of Rule 50 (b) of the Federal Rules of Civil Procedure. It is obvious that such a clarification of Rule 50 (b) is necessary when it is considered that the purpose of the rule in this connection is to expedite the judicial processes by eliminating unnecessary new trials. Petitioner respectfully suggests that this purpose is defeated when no distinction is made between a motion for a directed verdict as to the whole case, and a request for a directed verdict as to a particular issue.

III.

As stated heretofore, Respondents' claims against Petitioner for LOSS OF ABILITY TO HAVE CHILDREN and PAIN AND SUFFERING OF MRS, FRANICEVICH were based upon the alleged assault of Petitioner's employee, Jack Grammer, against Mrs. Franicevich. There being no evidence to show that Petitioner's employee at any time committed an assault against Mrs. Franicevich, Petitioner, at the close of the trial and before the withdrawal of the jury, by separate motions, requested the Trial Court to withdraw each of these issues from the jury's consideration on the ground that the evidence did not show that the injuries were the proximate result of the alleged assault. The Trial Court declined to rule on these motions before submitting the

whole case to the jury, thus supplying to each of them the rule applicable to a motion for a directed verdict on the whole case as pointed out hereinabove. After the jury returned its verdict Petitioner filed motions for a judgment notwithstanding the verdict and alternatively for a new trial. All of the above motions were overruled by the Trial Court.

The Circuit Court of Appeals in its opinion affirming the judgment and orders of the Trial Court failed to pass on the merits of Petitioner's contention that there was no evidence to show that Petitioner's employee had assaulted Mrs. Franicevich, but held that:

> "*Conetti's instructions* to 'move your wife and kid out of the way or we will let you have it through the door' was as much a threat against Mrs. Franicevich as it was against her husband." (196 Fed. 2d 258, 260; R. 369) (Emphasis supplied)

Such a holding by the Circuit Court of Appeals is contrary to Louisiana law which does not allow recovery against an employer for the tortious acts of a person other than its employee. In its application for rehearing Petitioner pointed out to the Circuit Court of Appeals its error in holding Petitioner liable for the acts of a party other than its employee, and in addition, emphasized that Petitioner's liability for the acts of Conetti was not raised by the pleadings or proof and that such a finding by the jury was precluded by the Trial Court's instructions. Petitioner submits that the sole basis upon which the Circuit Court of Appeals in its opinion held Petitioner liable for the alleged injuries to Mrs. Franicevich, namely, LOSS OF ABILITY TO HAVE CHILDREN and PAIN AND SUFFERING OF MRS. FRANICEVICH was the acts of Conetti, a

party other than its employee. In view of this holding by the Circuit Court of Appeals, Petitioner considers it proper to quote from Respondents' brief opposing Petitioner's application for rehearing wherein they assert:

> "Further with respect to the first error alleged by appellant, there has never been any attempt on the part of appellees to hold Jack Grammer responsible for the actions of Charles Connetti." (R. 385)

Petitioner's application for rehearing was denied without opinion.

Petitioner is not here concerned with any tortious acts which its employee, Jack Grammer, may have committed against Respondent, Bosco Franicevich, for the reason that any injuries Mrs. Franicevich may have suffered from shock caused by concern for her husband is not a matter for which Louisiana law allows the recovery of damages as illustrated by *Sperier v. Ott*, 116 La. 1087, 41 So. 323, *Hughes et ux v. Gill*, 41 So. 2d 536, La. App. and *Grier et ux v. Tri-State Transit Co.*, 36 F. Supp. 26, D.C., W.D. La.

Petitioner submits that the Circuit Court of Appeals in affirming the judgment and orders of the Trial Court has held Petitioner liable for the acts of a third person other than its employee, as shown by the language of the Court, quoted above, and that this holding is beyond the permissive scope of Louisiana Revised Civil Code, Article 2320, and is, therefore, contrary to established Louisiana law which limits vicarious liability to those instances enumerated in Louisiana Revised Civil Code, Articles 2317 through 2322, and applicable statutes. *Adams v. Golson*, 174 So. 876, 186 La. 363 (1947), *Gott v. Scott*, 199 So. 460 L. App. (1940).

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

GULF REFINING COMPANY,
Petitioner.

By ARCHIE D. GRAY
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July , 1952.

APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 50. Motion for a Directed Verdict

(a) When Made: Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

LOUISIANA REVISED CIVIL CODE:

"Art. 2317. We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications.

"Art. 2318. The father, or after his decease, the mother, are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons.

"The same responsibility attaches to the tutors of minors.

"Art. 2319. The curators of insane persons are answerable for the damage occasioned by those under their care.

"Art. 2320. Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.

"Teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence.

"In the above cases, responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it.

"Art. 2321. The owner of an animal is answerable for the damage he has caused; but if the animal had been lost, or had strayed more than a day, he may discharge himself from this responsibility, by abandoning him to the person who has sustained the injury; except where the master has turned loose a dangerous or noxious animal, for then he must pay for all the harm

done, without being allowed to make the abandonment.

"Art. 2322. The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction.

"Art. 2323. The damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently."

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MABEL ATCHISON, WIFE OF, AND
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Respondents.

Answer By Respondents To Petition For
Writ of Certiorari

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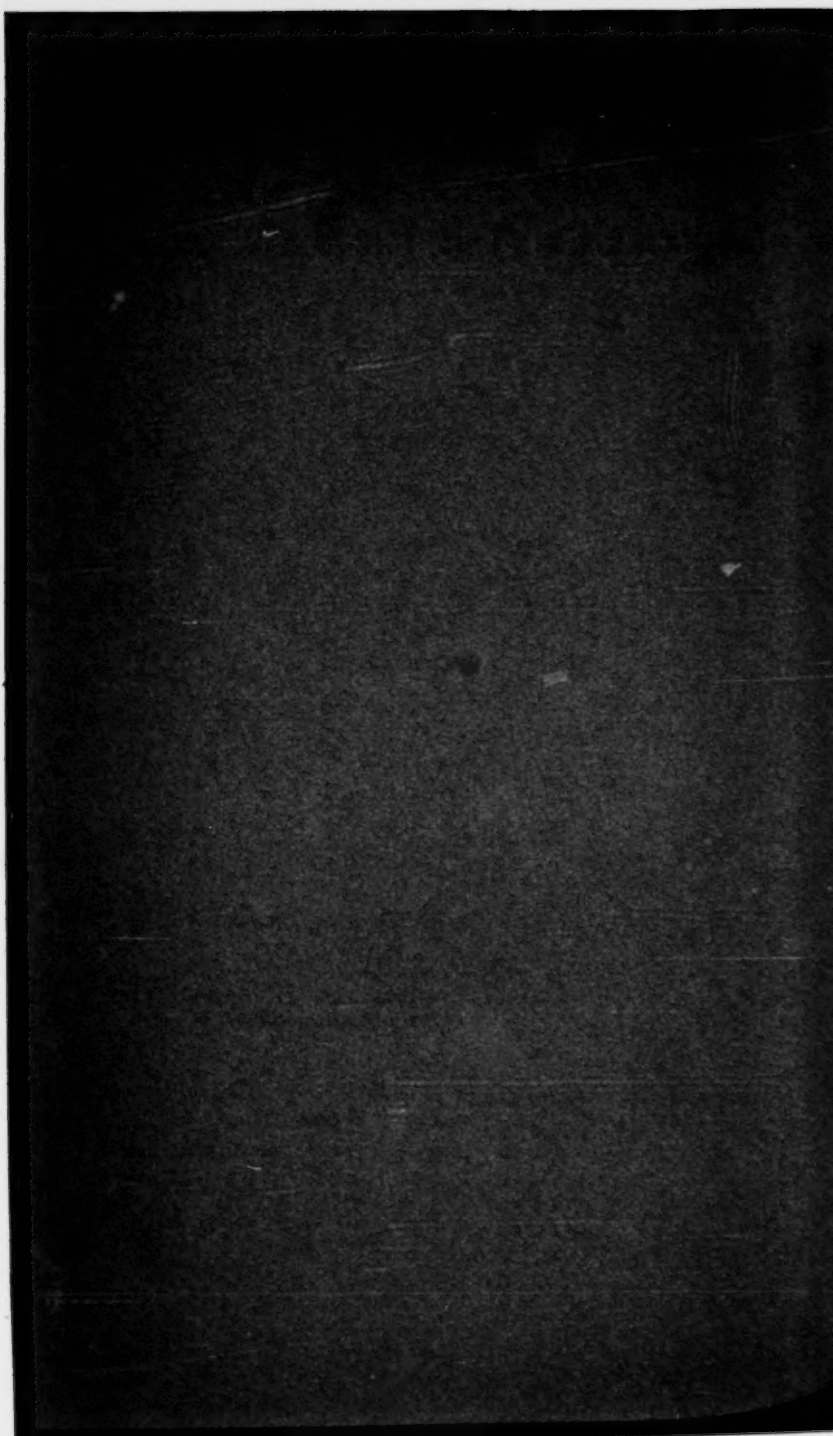

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term A. D. 1952

No. 234

GULF REFINING COMPANY,
Petitioner,

versus

MABEL ATCHISON, WIFE OF, AND
BOSCO FRANICEVICH,
Respondents.

Answer By Respondents To Petition For
Writ of Certiorari

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents, Mabel Atchison, wife of, and Bosco Franicevich, respectfully answer herein the petition on the part of the Gulf Refining Company, asking this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment

and opinion rendered in this cause on May 2, 1952, adverse to petitioner herein, and application for rehearing having been denied on June 20, 1952.

I CORRECTED STATEMENT OF CASE

In accordance with Rule 27, Section 4, of the Rules of this Honorable Court it is respectfully called to the attention of this Honorable Court that several inaccuracies and/or omissions exist with respect to statement of the case as set forth in petitioner's petition and brief heretofore submitted.

In petition for writ of certiorari, and brief in support thereof, as filed on July 29, 1952, page 3 thereof, petitioner states:

> "After occupying this building for several years, Bosco Franicevich objected to petitioner's use of its right-of-way."

This statement of fact is inaccurate for the reason that the said Bosco Franicevich did not object to petitioner's use of its right-of-way, BUT OBJECTED TO THE MANNER IN WHICH PETITIONER USED SAID RIGHT-OF-WAY, PARTICULARLY AS CONCERNS CONTINUED VIOLATION OF RESPONDENT'S RIGHTS UNDER HIS SUBLEASE COUPLED WITH WANTON DESTRUCTION OF RESPONDENT'S PROPERTY (Art. 4 of Complaint, R. 3, 4 - Testimony of Bosco Franicevich, R. 28).

Further correcting Petitioner's alleged statement of

fact on page 3 of his petition and brief, there is set forth the following statement:

> "Thereafter an argument ensued between Bosco Franicevich on one hand, and Charles Conetti, Louis Mistich and Jack Grammer on the other hand."

This statement is inaccurate for the reason that all of the evidence and testimony forming part of this record indicates that THE SAID JACK GRAMMER, TRANSPORTATION SUPERINTENDENT FOR PETITIONER, CONSPIRED AND PLANNED AND INSTRUCTED THE SAID TWO DEPUTY SHERIFFS, CHARLES CONETTI AND LOUIS MISTICH TO PERPETRATE THE COMPLAINED OF ASSAULT ON YOUR RESPONDENTS; WHICH PLAN AND CONSPIRACY WAS CARRIED OUT WITH MALICE, DELIBERATION AND SPECIFIC INTENT, AND THAT THE SAID **JACK GRAMMER LEAD THE SAID ASSAULT** (R. 30, 31, 32, 56, AND 113).

On page 4 of Petitioner's brief is the statement that:

> "There was no evidence whatever offered by Jack Grammer, Petitioner's employee, at any time threatened or committed any overt acts against Mrs. Franicevich."

THE ACCURACY OF THIS STATEMENT IS ENTIRELY DISPELLED BY INNUMERABLE STATEMENT OF WITNESSES CONTAINED IN THE RECORD (R. 30, 31, 32, 51, 56, 57, 59, 60, 68, 263, 272 and 289).

Also in connection with this mis-statement of fact, see opinion of the United States Circuit Court of Appeals for the Fifth Circuit, *Gulf Refining Company versus Mabel Atchison, wife of, and Bosco Franicevich*, 196 F (2d) 258, (R. 368) wherein the Court said:

> "The matter was not allowed to rest, however, but was resurrected when Grammer suggested that 'they get him out, then shoot him.' It is clear that the original difficulty had terminated and the events which followed were instigated and encouraged by Grammer."

On page 5 of Petitioner's brief in his statement of fact he sets forth:

> "Dr. Reeves, Dr. Beacham and Dr. Dyer testified without contradiction that the operation performed on Mrs. Franicevich and resulting in her sterility was necessitated by uterine fibrosis, uterine myoma hyperplasia, and that this condition existed prior to the alleged assault."

This statement on behalf of Petitioner is fraught with irreconcilable misstatements. Neither Dr. Reeves nor Dr. Beacham made any statement in conformity with Petitioner's stipulation to that extent (R. 72 through 93 Dr. Reeves' testimony; R. 281 through 284, Dr. Beacham's testimony).

Dr. Dyer (R. 320) **testified that fibrosis may or may not have been the cause of the abortion. Dr. Dyer further testified** (R. 321, 322, and 323) **that he could not really**

tell the cause of the abortion without examination of the fetus, and without examination and DETAILED HISTORY OF THE MOTHER IN HER PRENATAL PERIOD.

The sum and substance of the testimony of Drs. Reeves, Beacham and Dyer was to the effect that they were not able to form any definite fixed opinion as to the cause of the abortion and the resultant sterility.

Please note (R. 342) charge of the United States District Court to the jury, which is as follows:

> "If you find that the operation performed upon Mrs. Franicevich resulted from a long existing diseased condition, and was not connected with the affairs which occurred on the evening of July 29, 1947, then your verdict must be that the defendant is not liable for her loss of ability to have children."

As a result of the foregoing charge, this matter was properly submitted to the jury and the finding of fact was thereby legally established in favor of Respondents and against Petitioner herein.

II ARGUMENT

A. The first specification of error on behalf of Petitioner herein, deals with the action of the Circuit Court of Appeals for the Fifth Circuit in affirming the Trial Court's action in submitting the issue LOSS OF ABILITY TO HAVE CHILDREN together with other issues to the jury for a general verdict over petitioner's timely objection,

that there was **NO** evidence that the sterility of Mrs. Francevich was the proximate result of the alleged assault.

Petitioner further resolves this first specification of error with the statement that the Circuit Court of Appeals for the Fifth Circuit in this case has reached a position contrary to other Circuit Courts of Appeal, and in connection therewith cites *Rashaw v. Central Vermont RR Co., Inc.* 133 F (2d) 53, 2 CCA; *B&O RR v. Deneen*, 161 F (2d) 674; and *Roth v. Swanson* 145 F (2d) 262, 8 CCA.

In the case of *B&O RR v. Deneen*, supra, the court therein used the following language:

> "The law is well established that where there is **NO** evidence to sustain certain acts *****."

In the case of *Rashaw v. Central Vermont RR Co., Inc.* supra, the court said:

> "The result is that the case was submitted to the jury upon allegations of negligence which were not supported by **ANY** SUBSTANTIAL EVIDENCE WHATSOEVER. ***** ."

In the case of *Wilmington Star Mining Co. v. Fulton*, 205 US 60, this Honorable Court held that it is reversible error to submit an issue or count to the jury unsupported by substantial evidence over defendant's objections, but, there shall **ONLY** be reversible error in the following cases:

1. **Where there is no evidence.**
2. **Where there is nothing in the record.**
3. **Where it is doubtful as to whether there was any evidence.**

From the language of the aforesaid jurisprudence it is quite apparent that the only time reversible error can occur, where an issue is submitted to the jury over defendant's objection, is **WHERE THERE IS NO EVIDENCE WHATSOEVER TO SUPPORT APPELLEE'S ISSUE.**

Further with respect to Petitioner's first specification of error, there is contained therein the statement that "there was no evidence that the sterility of Mrs. Franicevich was the proximate result of the alleged assault."

This Honorable Court in the Case of *Milwaukee and St. Paul RR Co. v. Kellogg* 94 US 469, defined proximate cause thusly:

> "Primary cause may be the proximate cause of a disaster though it operates through successive instruments; as, an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement. The question always is, was there an unbroken connection between the wrongful act and the injury — a continous operation? Did the facts constitute a continual succession of events so linked together as to make a natural whole, OR WAS THERE SOME NEW AND INDEPENDENT CAUSE INTERVENING BETWEEN THE WRONG AND THE INJURY? In this case, the

only cause that can be suggested as intervening between the negligence and the injury to plaintiff's condition of mind, to-wit: her fright. Now, if the fright was the natural consequence of — was brought about — caused by — circumstances of peril and alarm in which defendant's negligence placed the plaintiff, and the fright caused the nervous shock and convulsion and consequent illness, the negligence was the proximate cause of these injuries."

Proceeding from this accepted definition of proximate cause, note the hereinafter enumerated, undisputed and uncontradicted facts as set forth in the record:

1. Altercation between plaintiff and respondents took place July 29, 1947, between 8:00 and 10:00 P.M. immediately thereafter Mrs. Franicevich had a severe headache and pains across back; "I felt bad; I was feeling shaky; I felt funny" (R. 119).

2. Mrs. Franicevich slept very little that night. (R. 119)

3. Mrs. Franicevich wasn't feeling any better next morning. (R. 120)

4. About 12:00 or 12:30 noon (July 30, 1947), Mrs. Franicevich started hemorrhaging (R. 120).

5. Couldn't get a doctor and friend stayed with Mrs. Franicevich. (R. 120)

6. Around 3:00 or 3:30 A.M. that night, Mrs. Franicevich had a miscarriage. (R. 121, 228, 229.)

7. Fetus placed in a towel. (R. 121).

8. Dr. D'Ingianni came 6:00 A.M. that morning (July 31, 1947) and examined fetus. (R. 122, 221.)

9. Mrs. Franicevich went across river to office of Dr. D'Ingianni in Buras where he gave her ether and performed afterbirth operation. (R. 123, 223, 224)

10. Mrs. Franicevich went back to Dr. D'Ingianni two days later to remove pack. (R. 124, 225)

11. Mrs. Franicevich saw her personal physician, Dr. Reeves on August 15, 1947, when he came back from vacation. (R. 124, 73)

12. Mrs. Franicevich testified she had been bleeding continuously since pack was removed by Dr. D'Ingianni on approximately August 2, 1947, and that's why she went to see Dr. Reeves.

13. Mrs. Franicevich visited Dr. Revees many times and despite efforts on his part — hemorrhaging would not stop. (R. 124, 74.)

14. Dr. Reeves sent Mrs. Franicevich to Dr. Beacham in New Orleans (R. p. 125) because Dr. Reeves couldn't stop hemorrhaging.

15. Dr. Beacham performed hysterectomy on Mrs. Franicevich on November 5, 1947 (R. 282)

16. Mrs. Franicevich was in hospital about 21 days. (R. 125)

The above are all proven uncontradicted facts. They chronologically trace Mrs. Franicevich's condition from the exact time of the beginning of her trouble at 10:00 P.M. July 27, 1947, immediately following the altercation, and takes Mrs. Franicevich, step by step, up to her operation in the hospital and her subsequent discharge therefrom on November 23, 1947. There seems little or no doubt that these unbroken chain of events fits that definition of proximate cause as set forth by the Supreme Court of the United States in the Kellog case, supra. There was an unbroken connection between the wrongful act and the injury — it was a continued operation. The proven facts constitute a continual succession of events so linked together as to make a natural whole, and there was no new or independent causes which intervened between the wrong and the injury.

Further in connection with the first specification of error, the Circuit Court of Appeals for the Fifth Circuit in its decision (196 F (2d); (R. 367, 368, 369) states as follows:

> "It is further contended by appellant that the evidence does not support appellees' allegation that the miscarriage and subsequent loss of ability to have children had any causal connection with the altercation. The trial Court properly submitted this issue to the jury with instruction, (fol. 370)

requested by appellant, that if it should find from the evidence that the miscarriage and subsequent operation performed on Mrs. Franicevich resulted from a pre-existing condition and was not connected with the events complained of, then it should find for the appellant. The evidence disclosed that Mrs. Franicevich was suffering from a condition which made her more susceptible to a miscarriage and one which might have ultimately caused her to undergo surgery. This fact, however, does not preclude her from recovering damages for injuries resulting from the acts complained of, since a TORTFEASOR must take his victims as he finds them. *Valence v. La. Power & Light Co.*, 50 So (2d) 847; *Delpido v. Colony*, 52 So. (2d) 720."

Further, the Fifth Circuit Court of Appeals in the aforementioned decision (R. 369), as to whether or not certain items of damage should have been submitted to the jury for consideration, said:

"Under its third proposition, appellant urges that the items of damage contended for by appellees should not have been submitted to the jury for consideration because they were not supported by sufficient evidence. Article 2315, Revised Civil Code of Louisiana, provides: 'Every act whatsoever of man that causes damages to another, obliges him by whose fault it happened, to repair it.' This statute has been interpreted by the Supreme Court of Louisiana to include damages for fright occasioned by the negligence of

another, *Stewart v. Arkansas Southern R. Co.*, 36 So. 676, as well as mental distress, *Lewis v. Holmes*, 34 So. 66. In the case of *Rebouche v. Shreveport Rys. Co.*, 53 So. (2d) 510, it was held that a woman who had been in a state of pregnancy for 3½ months when she was involved in a collision was entitled to recover damages for mental suffering and apprehension over the possible effect of the accident, although she suffered no physical injury and her apprehension (fol. 372) was unjustified. In *Valence v. La. Light & Power Co.*, supra, a judgment for a husband for mental anguish and worry over the fear that an injury sustained to his wife, who was at the time in a state of pregnancy, might have caused injury to the unborn child was affirmed. In that case it was determined that the abortion was not a result of the injury received by the wife, however, she was allowed to recover damages for mental anguish and worry over the fear that the unborn foetus might have been injured by the negligence of the defendant.

"In *Valence v. La. Light & Power Co.*, supra, the Court, by way of dicta, stated, 'There can be no doubt at all that there could be a recovery for a result of an accident which might cause sterility, or which might otherwise prevent parents from having children . . . It necessarily follows, we think, that parents are actually expecting the arrival of a child, and they are deprived of the fruition of that great expectation by the actionable negligence of someone else, they may recover

from the tortfeasor as an item of damage for that particular loss.' This is the only reasonable conclusion which may be arrived at. If damages for mental distress occasioned by fear that an unborn child or foetus may have been injured, or that an abortion may result from the negligence of another, it is inescapable that damages may be recovered for mental anguish and for pain and suffering occasioned by the actual occurence of the event feared. In any event, the very circumstances and nature of the assault, which the jury undoubtedly must have found to have existed in this case, would authorize the recovery (fol. 373) of damages. It is concluded that the verdict and judgment are supported by the evidence and are consistent with the applicable law. "Judgment affirmed."

ON THE BASIS OF THE FOREGOING, PETITIONER'S STATEMENT THAT THE FIFTH CIRCUIT COURT OF APPEALS IN TAKING A CONTRARY POSITION HAS CREATED A CONFLICT AMONG THE CIRCUIT COURTS ON THIS QUESTION, IS NOT A TRUE REFLECTION OF THE FACTS AND LAW AS PORTRAYED IN THIS RECORD.

B. The second specification of error urged by Petitioner, deals with the action of the trial Court, in withholding decisions of Petitioner's motions (in the trial Court) to withdraw particular issues from the jury, prior to submission of the whole case, to the said jury for a general verdict.

This specification of error has to do with a proper interpretation of the effect of Rule 50 (b) of the Federal Rules of Civil Procedure. In essence, Rule 50 (b) says that where a motion is made for a directed verdict, that the ruling thereon may be withheld until after the jury has returned its verdict. Petitioner suggests that the trial Court erred in its application of said Rule 50 (b) for the reason, that there is no distinction made in the rules, and the trial Court made no such distinction, as to a motion for a directed verdict on the whole case, and a request for a directed verdict on a part of the whole case.

In other words, petitioner would have this Court believe that it is a matter of great public importance that this Honorable Court should pass upon the question of a proper application of Rule 50 (b) to the extent that the said Rule 50 (b) does not specifically say that the trial Court which is given the authority thereunder to withhold judgment on motion for a directed verdict, until after the jury's verdict on the whole case, that this said trial Court cannot effect the same procedure as concerns portions of the whole case.

It goes without saying by a logical analysis and without the necessity of quoting any jurisprudence, that the trial Court would necessarily have the power and the right under Rule 50 (b) to withhold judgment on a motion for a directed verdict on any issue or issues as well as on the case as a whole. This point, in the opinion of your Respondents, is one which necessitates little if any argument, particularly in view of the fact that same has never been presented to any Court for a decision thereon and that no jurisprudence exists in connection therewith. A decis-

ion with reference thereto is so patent on its face that it is too logical to question.

C. Specification of No. 3 as stated by Petitioner is that the Fifth Circuit Court of Appeals was at fault in sustaining a general verdict by affirming a finding by the Jury which was contrary to established local law.

Petitioner further complain on page 16 of his brief before this Honorable Court that there was no evidence to show that Petitioner's employee at any time committed an assault against Mrs. Franicevich.

With respect to Petitioner's statement as above indicated see decision of Circuit Court of Appeals for the Fifth Circuit, 196 F (2d) 258, (R. 368,) **where the court stated very plainly that Grammer instigated and encouraged the assault in question. Further as concerns this point, at least five (5) witnesses testified at the trial of this case that Jack Grammer did commit an assault upon your respondents herein.**

The testimony of these witnesses was not contradicted nor impeached and was properly presented to the jury. (R. 30, 31, 32, 51, 56, 57, 59, 60, 68, 263, 272, & 289)

In addition, see special charge by the Trial Judge to the jury (R. 342) wherein it was stated:

> "If you find that the evidence in this case equally supports the theory that the loss of Mrs. Franicevich's child on the night of July 30, 1947, or her general physical condition, or the alleged action

of Jack Grammer caused the alleged miscarriage and subsequent operation, then you must find for the defendant as to those items of damages."

This question was fairly and properly presented as a factual situation to the jury and after weighing same, they, the said jury found that the alleged actions of Jack Grammer undoubtedly caused the alleged miscarriage and subsequent operation, and in so finding, rendered a verdict in favor of your Respondents.

On page 18 of Petitioner's brief submitted to this Honorable Court and further in connection with Petitioner's third specification of error, there is a statement that the injuries Mrs. Franicevich may have suffered from shock caused by concern for her husband is not a matter for which Louisiana law allows for recovery of damages.

The Circuit Court of Appeals for the Fifth Circuit in its opinion (R. 367) says:

"THE EVIDENCE CLEARLY DISCLOSES, HOWEVER, THAT MRS. FRANICEVICH WAS AS MUCH A VICTIM AS HER HUSBAND WAS."

Those cases cited by Petitioner on page 18 of his brief, namely, *Sperier v. Ott*, 41 So. 323, and *Hughes et ux v. Gill*, 41 So. (2d) 536, concern themselves with factual situation with the same general pattern in which a child is injured in an accident and the father and/or mother sues for mental anguish.

This is not the situation or the facts before this Honorable Court. Mrs. Franicevich suffered actual damages resulting in a miscarriage — hemorrhaging for many months — and a subsequent hysterectomy as a result of which she can no longer have any children — the proximate and direct cause of which was the wanton, willful and negligent acts of the employee of your Petitioner.

MRS. FRANICEVICH IS NOT SUING FOR MENTAL ANGUISH; SHE IS SUING FOR ACTUAL PAIN AND SUFFERING AS A RESULT OF DAMAGES WHICH SHE SUSTAINED AS A RESULT OF A DEADLY ASSAULT WITH PISTOLS AND A MACHINE GUN.

The established doctrine and weight of authority in this country which exists at the present time permits recovery for damages as a result of a miscarriage without the necessity of any physical imact, and which damages are predicated purely on the basis of fright and hysteria.

Bell v. Great Nev. Ry Co., 26 L. R. 328 (Ireland)
Gilligan v. Robb, S. C. (Scotland)
Coyle v. Watson, A. C. 1915 (Scotland)
Purcell v. St. Paul City Ry. Co., 48 Minn. 134
Ala. Fuel & Iron Co. v. Baladoni, 73 So. 205
Watson v. Dilts, 89 NW 1068
Whitsell v. Watts, 159 Pac. 401
Green v. Shumaker, 73 Atl. 688
Kimberly v. Howland, 55 SE 778
Salmi v. Columbia Ry Co., 146 Pac. 819
Simone v. Rhode Island Co. 66 Atl. 202
Mack v. Southbound Ry. Co. 29 SE 905
Memphis St. Ry. Co. v. Bernstein, 194 SW 902

Gulf Ry. Co. v. Hayter, 54 SW 944
O'Meara v. Russel, 156 Pac. 550
Pankopf v. Hinkley, 123 NW 625
Sloan v. So. Calif. Ry. Co. 111 Cal. 683
Hill v. Kimball, 76 Tex. 210
Oliver v. LaValle, 36 Wis. 502
Fitzpatrick v. Great Western Ry Co., 12 Upper Canada, Q. P. 645
St. Louis S. W. Ry. Co. v. Murdock, 54 Tex. Civil App. 249
Chi. & N. W. Ry Co. v. Hunerberg, 16 Ill. App. 387
Lehigh & H. Ry. Co. v. Marchant, 84 Fed. 870
Hickey v. Welch, 91 Mo. App. 4
Barbee v. Reese, 16 Miss. 906
Stutz v. Chi. & N. W. Ry. Co. 73 Wis. 147
Ill. Central RR Co. v. Latimer, 128 Ill. 163
Bell v. Great Northern Ry. Co. 26 L. R. (Ireland) 432
Wilkerson v. Downtown, 2 Q. P., 57
Smith v. Pittsburgh Ry. Co. 23 Ohio State 10
Goken v. Dallugge, 72 Neb. 16
1 Thompson on Negligence, Sect. 156
1 Cooley on Torts, 3rd Ed. 95

In Louisiana the following cases and law have positively set forth a doctrine in keeping with the decision of the trial Court and the Circuit Court of Appeals for the Fifth Circuit.

Revised Civil Code, Article 2315
Pecoraro v. Kopnica, 173 So. 203
Klein v. Med. Bldg. Realty Co., 147 So. 122
Laird v. Natchitoches Oil Mill, 120 So. 692
Stewart v. Ark. So. RR Co., 36 So. 676

Bourg v. Lumber Co., 45 So. 972
Favalora v. N. O. Ry. & Light Co., 78 So. 944
Tnyes v. Chamber, 81 So. 265
Valence v. La. Power & Light Co., 50 So. (2d) 847
Delpido v. Colony, 52 So. (2d) 720

Further as concerns Petitioner's third specification of error on page 18 of his brief submitted to this Honorable Court, he states that the Circuit Court of Appeals for the Fifth Circuit and the Trial Court have erroneously held Petitioner liable for the acts of a third person other than its employee, and cites in support thereof the case of *Adams v. Golson*, 174 So. 876 and *Gott v. Scott*, 199 So. 460.

The *Adams v. Golson*, case, supra, concerns a tort action wherein an effort was made to hold a husband liable for his wife's torts which were committed out of his presence. The Court in this, the Adams case, held:

> "A husband was not liable for damages caused in a collision which occurred while wife was driving community automobile on way to obtain a meal, after attending a style show, and before attending meeting of a fraternal organization, since wife's acts were not associated with community affairs."

In the case of *Gott v. Scott*, supra, the court held:

> "Where an infant owner of an automobile oc-

LEED THRU

cupied the back seat of an automobile with an escort, and permitted another guest to operate the automobile, the guest did not become the agent or servant of the owner in driving the automobile so as to render the owner liable for damages sustained by sole occupant of another automobile with which the owner's automobile collided allegedly as the result of momentary negligence of the guest."

Your Respondents fail utterly to appreciate what bearing if any, or what legal significance can be drawn by these cases cited by Petitioner apropos to the case and factual situation being presented to this Honorable Court.

In conclusion, your Respondents urge that your Petitioner has failed in his brief and in his petition to present such a situation that would warrant this Honorable Court in granting writs of certiorari in the premises.

The Supreme Court rules, particularly Rule 38 states in essence in Section 5 thereof, that "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

Your Petitioner, in the opinion of your Respondents, has not set forth such a statement of fact and/or law which may be classified under those instances set forth in the Supreme Court Rule 39, Section 5, upon which this Honorable Court should grant a review on a requested

writ of certiorari and to that extent your Respondents respectfully submit that said writ of certiorari be denied.

Respectfully submitted,

MABEL ATCHISON, wife of,
and
BOSCO FRANICEVICH,

Respondents.

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Attorneys for Respondents.

CERTIFICATE

I hereby certify that a copy of the foregoing answer to petition for writ of certiorari has been mailed to opposing counsel, Archie D. Gray, 1200 Gulf Building, Houston, Texas, this day.

_____

August _____, 1952